IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE UNITED STATES OF AMERICA, *ex rel.* DONALD GALE, Plaintiff, vs. OMNICARE, INC., Defendant.	)	Case No. 1:10-CV-0127 Judge James S. Gwin

REPLY MEMORANDUM IN FURTHER SUPPORT OF RELATOR'S MOTION TO EXCLUDE THE EXPERT REPORT OF DR. MOHAN RAO, PH.D

Relator Gale submits this reply memorandum of law in further support of his Motion to Exclude the Expert Report of Dr. Mohan Rao, Ph.D. ("Def's Opp."). Relator's opening brief stands alone as a full repudiation of the specious arguments Omnicare makes in its opposition. But Dr. Rao's—and Omnicare's—misapprehension of the proper method of calculating damages in this case is so grievous that the error warrants further repudiation.

I. Dr. Rao's Conclusion That The Government Was Not Harmed By Omnicare's Kickback Scheme Is Erroneous And Irrelevant

Omnicare offers Dr. Rao's conclusion that the government did not suffer damages as evidence that the company did not engage in kickbacks. Quoting Dr. Rao, Omnicare suggests that "increasing the per diem rate or switching to a fee-for-service payment structure 'would not have resulted in fewer claims to or lower reimbursement amounts paid by the government,'" and that, as a result, SNFs have nothing to offer Omnicare in exchange for kickbacks (low per diems). Def's Opp. at 11 (quoting Rao Report ¶ 81). This argument is nonsensical. Facilities can—and do—reward Omnicare's kickbacks by agreeing to contract with Omnicare, thereby funneling lucrative Medicaid and Medicare Part D business its way. Absent kickbacks in the form of low *per diem* pricing, those government reimbursements might have gone *not to Omnicare*, but to a competitor of Omnicare. And indeed, as Dr. Rao and Omnicare have both conceded, a SNF's entire portfolio of government and private business travels with its *per diem* contracts.[1] Relator need not show more.

As Relator previously explained, "the Anti-Kickback Statute is concerned not just with *how much* the government pays, but *who receives* a given federal healthcare dollar." Relator's Opening Br. 10. Because the government need not have paid an inflated price in order for

[1] *See, e.g.*, Rao Report at ¶ 27.

Omnicare's *per diem* prices to have amounted to kickbacks, Omnicare's refrain that there has been "no government harm" is an empty one. As recognized in the Seventh Circuit's decision in *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), when the government sets a condition of payment, and a fraudster falsely claims payment despite violating that condition, the government's damages are equal to the value of claims paid.

Not surprisingly, Omnicare, also without basis, seeks to limit and distinguish *Rogan.*[2] In support of that effort, Omnicare misconstrues, among other things, the *Rogan* court's note that it would not assume that the relevant medical services at issue were provided or were necessary. (Def's Opp. at 12-13.) The argument fails. Judge Easterbrook ruled, plainly, that the court did not "think it important that most of the patients for which claims were submitted received some medical care." 517 F.3d at 453. Thus, the Seventh Circuit's analysis did not turn on whether or the extent to which the relevant services were provided or were medically necessary. *Id*.

Omnicare also makes the irrelevant distinction that the United States in *Rogan* alleged a violation of the Stark Act in addition to the AKS. (Def's Opp. at 12.) The court did not distinguish between the AKS and the Stark Act on the award of damages. Violation of either act, furthermore, amounts to a violation of a condition of payment.

Finally, Omnicare argues that *Rogan* is inconsistent with Sixth Circuit case law. (Def's Opp. at 13.) However, the cited cases did not involve violations of the Anti-Kickback Statute, nor otherwise undermine *Rogan. See United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002), *United States ex rel. Compton v. Midwest Specialties,* 142 F.3d 296 (6th Cir. 1998)).

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[2] Omnicare also suggests that, under *Rogan*, Dr. Rao's analysis might be relevant to the post-liability damages analysis, specifically whether fines should be limited as excessive. (Def's Opp. at 13). To whatever extent this may be true, it cannot not justify the admission of Dr. Rao as a liability expert for Omnicare.

For example, in *Roby*, "the Government contracted for Aircraft 89-0165 to be remanufactured to specific standards," but "[t]he helicopter as received by the Government did not meet those specifications." 302 F.3d at 648. The court held that the value of the nonconforming helicopter was *zero dollars*—in accordance with previous Sixth Circuit precedent. *Id*. at 647-48 (citing *Compton*, 142 F.3d at 305 & n.8). Even setting aside the differences between tangible contractual benefits (e.g., properly manufactured gears, which have a clear market value) and non-tangible ones (e.g., absence of kickbacks, which cannot be assigned a market value), *Roby* offers support that the damages are equal to the total value of the claims.[3]

II. Conclusion

For the reasons further stated here and in Relator's opening papers, Rao's report should be excluded from evidence.

[3] Omnicare's citation to *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012), is also misplaced. In contrast to the *Davis* relator, Gale does not allege Omnicare violated merely technical, recordkeeping requirements; rather, in the absence of the kickbacks, the government would have paid an entirely different pharmacy.

DATED: September 4, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was filed electronically this 4th day of September, 2013, with the U.S. District Court for the Northern District of Ohio. Notice of this filing will be sent via electronic mail to all parties who have entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF system.

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